

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MICHAEL J. MONA, JR.,

Plaintiff

v.

CV SCIENCES, INC.,

Defendant

Case No.: 2:21-cv-02196-APG-DJA

**Order (1) Denying Defendant's Motion for
Summary Judgment and (2) Ordering
Supplemental Briefing**

[ECF No. 7]

Plaintiff Michael J. Mona, Jr. sues the company he co-founded, defendant CV Sciences, Inc. (CVSI). Mona alleges CVSI caused him to incur millions in state and federal taxes by failing to withhold income tax when it issued him Restricted Stock Units (RSUs). He alleges breach of contract, breach of the implied covenant of good faith and fair dealing, and negligence. He seeks declaratory relief that his employment contract with CVSI is valid, injunctive relief ordering CVSI to pay the taxes, and indemnity from CVSI with respect to those taxes.

CVSI moves to dismiss. It argues that Mona's claims are barred because Mona should have brought them as compulsory counterclaims in a California state action CVSI filed against Mona in 2020. The parties are familiar with the facts, so I repeat them only as necessary to resolve the motion. I deny CVSI's motion.

I apply state law to determine whether a counterclaim was compulsory in a prior state court action. *Pochiro v. Prudential Ins. Co. of Am.*, 827 F.2d 1246, 1249 (9th Cir. 1987). I apply the law of the state where the action occurred. *See Fox v. Maulding*, 112 F.3d 453, 456-57 (10th Cir. 1997); *Vashisht-Rota v. Howell Mgmt. Servs.*, 837 Fed. Appx. 602, 602 (9th Cir. 2021). I therefore apply California law because CVSI sued Mona in California court. ECF No. 7-6.

1 Under California Code of Civil Procedure § 426.30(a), a defendant waives compulsory
 2 counterclaims by failing to bring them.¹ But a defendant does not waive unasserted compulsory
 3 counterclaims if he did not file an answer in the action. Cal. Code Civ. P. § 426.30(b)(2).

4 In the California case, Mona filed a motion to compel arbitration, but not an answer. ECF
 5 Nos. 7-7; 18 at 6; 19 at 2. Because Mona did not file an answer, he did not waive the claims he
 6 asserts in this case. I therefore deny the motion to dismiss.²

7 I raised sua sponte in the September 8, 2022 hearing whether I have jurisdiction over
 8 some or any of Mona's claims because they appear to be based on the parties' employment
 9 agreement, which has an arbitration clause. ECF No. 7-1 at 12. The arbitration clause appears to
 10 deprive me of jurisdiction. Therefore, I direct the parties to brief whether Mona's claims are
 11 governed by the arbitration clause.

12 I THEREFORE ORDER that by October 3, 2022, each of the parties shall file a brief of
 13 no more than 10 pages addressing whether any of Mona's claims is subject to the employment
 14 agreement's arbitration clause.

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 20 ¹ The defendant waives an unasserted compulsory counterclaim only if he had the claim at the
 21 time he served his answer to the complaint. Cal. Code Civ. P. § 426.30(a). The parties dispute
 whether Mona knew or should have known about his tax liability as early as 2019. I need not
 address that issue at this time.

22 ² I deny the motion to dismiss without prejudice. I am not deciding whether Mona waived these
 23 claims by failing to raise them in the previous arbitration proceeding or by participating in that
 proceeding. I decide only that Mona did not waive them as unasserted compulsory
 counterclaims in the California state court action, which is the basis of CVSI's motion.

1 I FURTHER ORDER that by October 14, 2022, each party may file a response brief of
2 no more than five pages.

3 DATED this 12th day of September, 2022.



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5 ANDREW P. GORDON
6 UNITED STATES DISTRICT JUDGE
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